

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

John M. Purcell,

Debtor.

Case No.: 98-18287
Chapter 11

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

The current matter was brought before the court via a motion by John M. Purcell (“Debtor”) to disallow the claim of Russ Freeman Excavating (“Creditor”). An evidentiary hearing was held at which, due to a violation of the scheduling order, the Creditor was precluded from offering any affirmative evidence; it was allowed to cross-examine the Debtor’s witnesses.

Jurisdiction

This is a core proceeding within the court’s jurisdiction pursuant to 28 U.S.C. §§ 157 (a)(2)(B) and 1334(b).

Facts

Based upon the pleadings and the uncontradicted evidence adduced at the evidentiary

hearing, the court finds the following facts:

1. In 1987, the Debtor formed a partnership (the “partnership”) with Mr. Bill Canfield, a cousin by marriage. The Debtor’s primary role in the partnership was to obtain financing; Mr. Canfield handled the daily operations.
2. The partnership was formed to develop certain land that the partners had inherited. The Creditor was employed to assist with this development project.
3. The Creditor also worked for several entities related to the partnership.
4. In 1995, the partnership’s debt to this Creditor had been paid and work was completed through phase 2. At this time, the Debtor informed the Creditor that there was a dispute among the partners as to whether work should continue through phase 3. He further advised the Creditor not to begin work on phase 3 without his authorization.
5. Despite this directive, the Creditor recommenced the work at the direction of Mr. Canfield.
6. The partnership has made payments sufficient to cover the partnership debt. However, some of these payments were applied to the debt of the related entities.
7. The Debtor has produced an appraisal¹ of the property owned by the partnership. This appraisal when reviewed in conjunction with the partnership debts demonstrates that the partnership is solvent.
8. On October 20, 1999, the Debtor made a motion objecting to this claim. On November 22, 1999, the court issued a scheduling order which set the trial date for April 3, 2000. Pursuant to a request by the parties the trial was rescheduled for August 8, 2000, with pretrial submissions due to the court on or before July 24, 2000. The Creditor failed to make the required submissions.

¹This appraisal, by consent of the parties and pursuant to Bankruptcy Rule 9018, is under seal to protect against the dissemination of commercial information.

Arguments

The Debtor advances several arguments in opposition to the Creditor's claim. He first contends that he explicitly notified the Creditor to cease work on the property and, notwithstanding any counter-direction from his partner, not to recommence working without his authorization. He argues that since the Creditor did not seek nor receive this approval he is not liable for the partnership debt.

The Debtor also argues that the Creditor performed work for four separate entities, including the partnership, and that it did not sufficiently distinguish between the companies when applying payments. The Debtor asserts that if the payments had been properly allocated the partnership bills would have been paid in full. Finally, he contends that the Creditor has failed to establish that the partnership is insolvent, and therefore, it is inappropriate to be looking to a bankrupt, individual partner for payment of the partnership debt.

The Creditor concedes the Debtor explicitly indicated his unwillingness to have the work proceed but argues that subsequently his partner authorized the work. It further argues that the Debtor knew the work had recommenced and derived a benefit when the property was sold. The Creditor does not address the argument regarding the solvency of the partnership but argues that the Debtor's contention that the payments were misallocated is irrelevant to this proceeding.

Discussion

I. Preclusion

On November 22, 1999, the court issued a scheduling order which calendared this trial for April 3, 2000. Pursuant to a request by the parties, the trial was rescheduled for August 8, 2000, and an amended scheduling order was issued on February 22, 2000. The amended scheduling

order provides, at paragraph six, that on or before July 24, 2000 the parties were to file with the court and serve on their adversary pretrial statements, witness lists and a list of exhibits. The Creditor failed to make the required submissions.

Paragraph 10 of the amended scheduling order specifically states that failure to comply with the order might result in “appropriate sanctions, preclusion, the striking of pleadings, and the entry of an Order or Judgment accordingly.” (Amended Scheduling Order Doc.# 96.) Prior to the commencement of the trial, the court provided the Creditor with the opportunity to explain its failure to file the necessary documents and to address the issue of the appropriate sanction for the omission. The Creditor could not offer any legitimate reason for its failure to comply with the scheduling order and, pursuant to paragraph 10, the court precluded it from offering any affirmative evidence.

II. Burden of Proof

Bankruptcy Rule 3001 governs a proof of claim and subsection (f) states, “A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.” Fed. R. Bankr. P. 3001(f). Courts analyzing this section have determined that to overcome this prima facie evidence, the objecting party must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim. *In re Allegheny Int’l, Inc.*, 954 F.2d 167 (3d. Cir. 1992). Once that evidence is offered, the burden then shifts to the claimant with whom the ultimate burden of persuasion rests. Fed. R. Bank. P. 3001(f) Adv. Comm. Notes; *See In re Barclay Bros. Inc.*, 1986 WL 15884 (Bankr. E.D. Pa. 1986); *In re Circle Dairy*, 92 B.R. 832 (Bankr. W.D. Ark. 1988); *In re Williams*, 1994 WL 329328 (Bankr. S.D. Ga. 1994).

In the present case, the Debtor has offered sufficient evidence to refute the allegations, thus, shifting the burden. However, the Creditor has failed in its burden of persuasion, therefore, the Debtor's objection to the claim is sustained.

The Debtor argues that the Creditor did not keep separate books and records for the work it performed for several entities including the Debtor's partnership and that it misallocated payments. The Creditor's testimony and the documentary evidence, or lack thereof, supports the Debtor's allegation. (Ex. "C" pp. 15-17, 27-28, Ex "D", Tr. 10.) Moreover, the evidence seems to indicate that the Creditor might, actually, owe the Debtor's partnership money. (Ex "D", Tr. 10.) The Debtor asks the court to conclude, as a matter of law, that the invoices which form the basis of the Creditor's claim are paid in full. The court declines to make such a determination, however, the evidence is sufficient to refute the prima facie validity of the proof of claim. The burden has shifted to the Creditor who, because of its inadequate books and records, has failed to persuade the court of the validity of its claim.

The Debtor further asserts that he notified the Creditor that he did not want the work to continue through phase 3. He concedes that his partner subsequently authorized the work and that general principles of partnership and agency law often hold partners liable for the wrong acts or omissions of each other during the ordinary course of business. (Debtor's Memorandum p. 4.) However, he argues because of his directive not to continue work into phase 3, the Creditor's reliance on the partner's authorization, to the contrary, was unreasonable. *Id.*

In response, the Creditor merely states that the Debtor knew that the work had recommenced and that by subsequently selling the property and reaping the benefit of the work, the Debtor ratified the Creditor's actions. However, it does not provide any legal authority for

this ratification proposition.

Finally, the Debtor argues that the partnership has sufficient assets to pay the claim and therefore, it is inappropriate to look to him, an individual partner, for payment. Case law provided by the Debtor supports this assertion. See generally, *Belgian Overseas Sec. Co., v. Howell Kessler, Co.*, 450 N.Y.S.2d 493 (1st Dept. 1982); *Helmsley v. Cohen*, 56 A.D.2d 519 (1st Dept. 1977). The Debtor has provided unchallenged financial information, including an appraisal of land owned by the partnership, indicating that the partnership assets are sufficient to cover its liabilities. The Creditor does not dispute these factual allegations nor does it offer contrary case law. However, since the ultimate determination regarding the validity of the proof of claim rests upon other grounds, the court refrains from discussing the Creditor's ratification argument and the Debtor's partnership solvency argument.

Conclusion

The Debtor has produced sufficient evidence to refute the validity of the proof of claim and the Creditor has not met its burden of persuasion. Thus, the Debtor's objection to the claim is sustained.

It is so Ordered.

Dated:
Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge

